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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/749,681

12/31/2003

Bryon Paul Day

KCX-1226 (19589)

2161

7590  
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02/27/2009

EXAMINER

MULLIS, JEFFREY C

ART UNIT

PAPER NUMBER

1796

MAIL DATE

DELIVERY MODE

02/27/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<p align="center"><b>Advisory Action</b> <b>Before the Filing of an Appeal Brief</b></p>	<p><b>Application No.</b> 10/749,681</p>	<p><b>Applicant(s)</b> DAY ET AL.</p>	
	<p><b>Examiner</b> Jeffrey C. Mullis</p>	<p><b>Art Unit</b> 1796</p>	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 11 February 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: \_\_\_\_\_.  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

/Jeffrey C. Mullis/  
Primary Examiner, Art Unit 1796

Continuation of 3. NOTE: It does not appear that any of applicants claims previously recited the range in claim 42.

Continuation of 11. does NOT place the application in condition for allowance because: The term "about" defines a range and no finite number of data points can define a range by themselves. Applicants argue that Vaughan' does not disclose the use of a block copolymer with melt flow rate of greater than 20. However patentees' claim 6 recites a melt flow rate of less than about 20 which encompasses melt flow rates of about 20 or more as recited by "b" of applicants' claim 33. Furthermore the Vector 4411 in Example 2 of column 8 with 44% styrene and a MFR of 40 is not consistent with patentees description of their first block copolymer which is said to be "soft" and therefore has a styrenic content (responsible for hardness) of about 30% or less (column 4, lines 7-10) and which contains no other (even debatable) disclosure regarding MFR except that it is "preferably" 20 or more (column 3, line 65). It is not clear how it can be said that styrenic contents of more than 40% are taught against when patentees use Vector 4411 with a styrene content of 44% in the examples. It is true that patentees Example 2 fails to disclose an SBS copolymer but column 4, lines 20-25 of the reference discloses the interchangeability of SBS and SIS for patentees' component 2. Maris discloses the high molecular weight of 1000000 as applying to star copolymers in paragraph 23 and thus implies that the molecular weight of 25000 applies to linear copolymers. It is not the position of the examiner that block copolymers having any of Maris' molecular weights would have MFR's of higher than 20. Maris specifically recites the end point of 25,000 and thus linear block copolymers of 25000 molecular weight can be said to be disclosed and as such a particular MFR can be said to be inherent in Maris's disclosure but even if the examiner is incorrect regarding this fact there is the issue of what MFR those skilled in the art would reasonably conclude would be workable based on Maris' disclosure and given what was known in the art regarding styrenic block copolymers having molecular weights similar to the lowest disclosed by Maris, they would reasonably conclude based on Maris' disclosure alone that MFR's of greater than 20 would be workable. It is true there is motivation to use block copolymers with higher MFR in Maris but that fact does not detract from the fact there is also motivation to use low molecular weight block copolymers in Maris. This issue is not relevant to inherency. In any case, if the examiner is incorrect about this also there is motivation to use the block copolymer of the secondary reference in the primary reference as set out above. Such modification of the primary reference does not rest on inherency as applicants' MFR is explicitly disclosed by the reference.